



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2013–0018]

[4500030113]

RIN 1018–AZ46

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Sphaeralcea gierischii* (Gierisch Mallow)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for *Sphaeralcea gierischii* (Gierisch mallow) under the Endangered Species Act of 1973, as

amended (Act). The effect of this regulation is to designate critical habitat for Gierisch mallow under the Act. This final rule implements the Federal protections provided by the Act for this species.

DATES: This rule is effective on **INSERT DATE 30 DAYS AFTER DATE OF
FEDERAL REGISTER PUBLICATION**.

ADDRESSES: This final rule, final economic analysis, and final environmental assessment are available on the Internet at <http://www.regulations.gov> and at <http://www.fws.gov/southwest/es/arizona/>. Comments and materials received, as well as supporting documentation used in preparing this final rule are available for public inspection at <http://www.regulations.gov>. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours, at U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ, 85021; by telephone (602) 242–0210; or by facsimile (602) 242–2513.

The coordinates, or plot points, or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at <http://www.fws.gov/southwest/es/arizona/>, and at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2013–0018, and at the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the Fish

and Wildlife Service website and Field Office set out above, and may also be included in the preamble and/or at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021; by telephone (602) 242–0210; or by facsimile (602) 242–2513. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

In this final rule, we refer to *Sphaeralcea gierischii* as Gierisch mallow.

Why we need to publish a rule. This is a final rule to designate critical habitat for the Gierisch mallow. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule.

Elsewhere in today's **Federal Register**, we list the Gierisch mallow as an

endangered species. On August 17, 2012, we published in the **Federal Register** a proposed critical habitat designation for Gierisch mallow (77 FR 49894). Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best scientific data available after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat.

The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for Gierisch mallow. We are designating approximately 5,189 hectares (ha) (12,822 acres (ac)) as critical habitat in two units in both Mohave County, Arizona, and Washington County, Utah, as follows:

TABLE 1: Designated Critical Habitat Units for Gierisch Mallow.

	Federal		State		
Critical Habitat Unit	Arizona	Utah	Arizona	Utah	Totals
Unit 1. Starvation Point	220 ha (544 ac)	802 ha (1,982 ac)	249 ha (615 ac)	68 ha (167 ac)	1,339 ha (3,309 ac)

Unit 2. Black Knolls	3,586 ha (8,862 ac)	0	263 ha (651 ac)	0	3,850 ha (9,513 ac)
Totals	3,806 ha (9,406 ac)	802 ha (1,982 ac)	512 ha (1,266 ac)	68 ha (167 ac)	5,189 ha (12,822 ac)

We have prepared an economic analysis of the designation of critical habitat.

In order to consider economic impacts, we have prepared an analysis of the economic impacts of the critical habitat designations and related factors. We announced the availability of the draft economic analysis (DEA) in the **Federal Register** on March 28, 2013 (78 FR 18943), allowing the public to provide comments on our analysis. We have incorporated the comments and have completed the final economic analysis (FEA) concurrently with this final designation.

We have prepared an environmental assessment of the designation of critical habitat. In order to consider environmental impacts, we have prepared an assessment of the environmental impacts of the critical habitat designations and related factors. We announced the availability of the draft environmental assessment in the **Federal Register** on March 28, 2013 (78 FR 18943), allowing the public to provide comments on our assessment. We have incorporated the comments and have completed the final environmental assessment concurrently with this final designation.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data and analyses. We obtained opinions from three knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, and whether or not we had used the best available information. These peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final designation. We also considered all comments and information we received during the comment period.

Previous Federal Actions

All previous Federal actions are described in the final rule to list the Gierisch mallow as an endangered species under the Act, which is published elsewhere in today's **Federal Register**.

Summary of Comments and Responses

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from four knowledgeable individuals outside the Service with scientific expertise to review our technical assumptions, interpretations of

biology, and use of ecological principles with respect to the Gierisch mallow. We received responses from three of the four peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding threats to Gierisch mallow. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final rule. Peer reviewer comments are incorporated into the final rule as appropriate.

We requested written comments from the public on the proposed designation of critical habitat for the Gierisch mallow during two comment periods. The first comment period, which was associated with the publication of the proposed rule, opened on August 17, 2012 (77 FR 49894), and closed on October 16, 2012. The second comment period opened on March 28, 2013 (78 FR 18943), and closed on April 29, 2013. We also contacted appropriate Federal, State, and local agencies; scientific organizations; peer reviewers; and other interested parties and invited them to comment on the proposed rule, draft economic analysis, and draft environmental assessment during these comment periods. Newspaper notices inviting general public comment were published in the Kingman Daily Miner on September 12, 2012, and in the Saint George Spectrum on September 13, 2012. Additionally, letters were sent to stakeholders and special interest groups on September 12, 2012. We received no request for a public hearing.

During the first comment period, we received 19 comment letters directly

addressing the proposed listing and critical habitat designation for the Gierisch mallow. During the second comment period, we received two comment letters addressing the proposed critical habitat. All substantive information provided during comment periods has either been incorporated directly into this final designation or is addressed below.

(1) *Comment:* The commenter noted that the draft environmental assessment states exclusion of the mine areas would provide an economic benefit to the community, while not resulting in the extinction of the species, owing to the protection and restoration measures already in place.

Our Response: Our draft environmental assessment presented three alternatives that were analyzed for their effects to the environment. One of those alternatives, Alternative C, looked at environmental effects associated with our proposed critical designation if we excluded the mining areas. The rationale for Alternative C was based on possible economic benefit to the community. Under section 4(b)(2) of the Act, we consider the probable economic impacts of specifying any particular area as critical habitat. Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exerting her discretion to exclude any areas from this designation of critical habitat for the Gierisch mallow based on economic impacts. See the discussion under “Exclusions Based on Economic Impacts.”

(2) *Comment:* One commenter stated that, as noted in the proposed rule, the

Gierisch mallow is also protected under terms of the Arizona Native Plant Law, incorporated into their mining lease from the Arizona State land Department (ASLD), and by section 7(a)(1) of the Act, requiring the Secretary of the Interior (and the Bureau of Land Management (BLM)) to use her authorities, including leases on public lands, in furtherance of species protection.

Our Response: A species is not protected under section 7(a)(1) of the Act unless it is listed under the Act. (Elsewhere in today's **Federal Register**, we published a final rule to list the Gierisch mallow as an endangered species under the Act.) Section 7 of the Act applies to listed species and their habitats for projects having a Federal nexus (occurring on federal lands, having federal funding, or requiring a federal permit). Section 7 consultations do not apply to ASLD lands unless a Federal nexus is present.

(3) *Comment:* One commenter stated that the economic and environmental analyses have demonstrated conclusively that the plants are adequately protected through existing mechanisms, and that the economic benefits of excluding the mining areas from the critical habitat designation outweigh any environmental benefit from including them.

Our Response: The environmental assessment did not discuss the adequacy of existing mechanisms to protect the species in lieu of listing but instead compared a no action alternative, which includes Federal listing of the species, to one action alternative that includes critical habitat designation as described in the proposed rule and a second action alternative that includes designation of critical habitat, but with the mine areas

excluded. The draft environmental assessment did not weigh economic benefits against environmental benefits for any alternative. The economic analysis did not discuss the adequacy of existing mechanisms to protect the Gierisch mallow nor did it discuss excluding any lands proposed for critical habitat designation. The economic analysis discussed the increased costs associated with designating critical habitat.

(4) *Comment:* The Service should exclude lands under lease by Georgia-Pacific or subject to its mining claims because of the economic impact.

Our Response: Currently, the land being leased by Georgia-Pacific is administered by the ASLD, and there is no Federal nexus. Additionally, according to the final economic analysis and its findings of baseline and incremental impacts, the main costs associated with the listing of the Gierisch mallow are attributable to consultation with the Service through section 7 of the Act. Therefore, there are no projected costs associated with designating critical habitat for the Gierisch mallow on ASLD Lands. Because there are no projected costs associated with the mining operation on ASLD lands, beyond those attributed to consultation with the Service through section 7 of the Act, and because the final economic analysis has determined that Georgia-Pacific does not meet the small business standard, the Secretary of the Interior is not exercising her discretion to exclude these lands from critical habitat.

(5) *Comment:* One commenter asserts that impacts to gypsum mining on ASLD and BLM lands from the proposed rule should include not only the value of production

foregone due to operational constraints imposed by the Service, but also lost wages, employment opportunities, royalties paid to Federal and State lessors, taxes, and the multiplier effect of these expenditures.

Our Response: As discussed in Chapter 4 of the draft economic analysis, there is no Federal nexus for gypsum mining on ASLD lands, and therefore section 7 consultation on these activities is not necessary and the level of mining is not expected to be affected. BLM is required to consult with the Service on mining activity occurring on BLM-managed lands. The final economic analysis includes two future consultations on mining activity on BLM-managed land and assumes that these consultations will not result in changes to the level of mining activity. The Service expects the most likely outcome of these consultations to include conservation measures such as land reclamation. As such, the draft economic analysis estimated the future cost of seed collection, transplanting, and propagation for the plant in areas where mining is expected to occur. As a reduction in future mining activity is not estimated, there are not expected to be resultant impacts on local employment or other economic factors.

(6) *Comment:* One commenter requests omission of misstated information in the draft economic analysis, specifically, the sentence in paragraph 178 reading: “The current mining plans would allow gypsum deposits suitable for mallow habitat to remain on, at most, 15 acres of the 400-acre lease area.” According to the commenter, the lessee would be responsible for reclamation of the entire site.

Our Response: This sentence has been omitted in the final economic analysis and the estimated baseline costs have been revised throughout the report to reflect this change in the area that requires reclamation. Estimated reclamation costs increase from \$77,000 to \$80,000 as a result of this change.

(7) *Comment:* One commenter provides new information on potential future gypsum mining activities on BLM lands and the predicted value of mining claims as it relates to the expected gypsum deposits in those claims.

Our Response: A formal consultation on these mining activities and its associated cost has been added to the final economic analysis. In addition, the information regarding the value of mining claims has been included in the final economic analysis for context.

(8) *Comment:* Critical habitat increases threats to private land because management of critical habitat promotes weeds and fires.

Our Response: Designation of areas as critical habitat does not require specific management actions in those areas. In the preamble of this rule, as well as in the August 17, 2012, proposed rule (77 FR 49894), the description of each unit within our critical habitat designation only identifies special management considerations or protection that may be needed to maintain the primary constituent elements (PCEs) necessary for Gierisch mallow. Further, we did not recommend any management that would be

expected to lead to weeds and fires. The identification of special management considerations or protection does not mandate such measures take place.

(9) *Comment:* We received several comments stating that the area proposed for designation as critical habitat was too large and not necessary to protect the species.

Our Response: Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

The areas we are designating as critical habitat for the Gierisch mallow include all areas that contain the physical or biological features, such as gypsum soils, pollinators, pollinator habitat, native vegetation, and areas free of nonnative vegetation, that are essential to the conservation and survival of the Gierisch mallow. Although the Gierisch mallow populations occur on less than approximately 186 ha (460 ac), it is important to protect those gypsum soils that include pollinator habitat and provide opportunities to aid in the recovery of the species.

(10) *Comment:* The Service should recommend excluding livestock from critical habitat through fencing exclosures.

Our Response: Please refer to the seasonal use suggestions in the *Special Management Considerations or Protection* section. Livestock grazing is not the most serious threat. We know that livestock trample and eat plants; however, the plants have been documented to recover from herbivory and trampling. It is more important to reduce livestock herbivory during the flowering and seeding period so that plants will have the opportunity to reproduce and contribute to the recovery of the species. This can be accomplished through various management actions, including, but not limited to, seasonal rotations for pastures, reducing stocking rates, or removing livestock completely during drought years. Some allotments currently have seasonal rotations or deferred use where pastures are rested from grazing, thereby allowing the plants and PCEs of critical habitat sufficient recovery. Based on what we know today, permanently excluding livestock grazing from critical habitat is not necessary.

Summary of Changes from Proposed Rule

The most significant changes between the August 17, 2012, proposed rule (77 FR 49894) and this final rule are changes to the primary constituent elements (PCEs) for the Gierisch mallow and the addition of discussions regarding land managed by the State of Utah School and Institutional Trust Land Administration (SITLA). We received information related to Gierisch mallow being associated with biological soil crusts within

the gypsum soils. Because of this new information, we include biological soil crusts as a PCE for the Gierisch mallow. Additionally, 68 ha (167 ac) of Gierisch mallow habitat on SITLA land is included in our calculations. This area was included in our proposed rule within critical habitat Unit 1 and was included in our total proposed critical habitat acreage; however, we reevaluated land ownership for these 68 ha (167 ac) and verified that they are owned by SITLA rather than the BLM, and the BLM administers the grazing lease for these lands. This final rule reflects this information. These are the only significant changes in this final rule.

Critical Habitat

Prudency Determination

Section 4 of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) the designation of critical habitat would not be beneficial to the species.

There is no indication that the Gierisch mallow is threatened by collection, and

there are no likely increases in the degree of threats to the species if critical habitat is designated. This species is not the target of collection, and the areas we are designating either have restricted public access (mine sites) or are already readily open to the public (BLM land). None of the threats identified to the species are associated with human access to the sites, with the exception of the threats associated with recreational activities on BLM land. This threat, or any other identified threat, is not expected to increase as a result of critical habitat designation because the BLM cannot control unauthorized recreational activities, and the designation of critical habitat does not change the situation.

In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits of critical habitat to the Gierisch mallow include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur, because, for example, Federal agencies were not aware of the potential impacts of an action on the species; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments, or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to any of the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Gierisch mallow.

Background

It is our intent to discuss below only those topics directly relevant to the designation of critical habitat for the Gierisch mallow in this section of the final rule. For a complete description of the life history and habitat needs of the Gierisch mallow, see the final rule listing the Gierisch mallow as an endangered species, published elsewhere in today's **Federal Register**.

Critical habitat is defined in section 3 of the Act as:

- (1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features
 - (a) Essential to the conservation of the species and
 - (b) Which may require special management considerations or protection; and
- (2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law

enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographic area occupied by the species at the time it was listed (in this case, currently occupied areas) are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2)

which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements (PCEs) are the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic area occupied by the species at the time it is listed (in this case, outside currently occupied areas), upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the

best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and

outside the critical habitat designation, will be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographic area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;

- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, or rearing (or development) of offspring; and
- (5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the Gierisch mallow from studies of this species' habitat, ecology, and life history as described in the *Habitat and Life History* section of our final listing rule published elsewhere in today's **Federal Register** and in the information presented below. We have determined that the following physical or biological features are essential for the Gierisch mallow.

Space for Individual and Population Growth and for Normal Behavior

The Gierisch mallow has a limited distribution; it is only found in a small area in Utah and Arizona. Within these areas, the Gierisch mallow requires appropriate soils, associated formations, slope, drainage, and plant community types within the landscape to provide space for individual growth and to provide food, water, air, light, minerals, or other nutritional or physiological requirements. In both Arizona and Utah, the Gierisch mallow is found in gypsiferous outcrops of the Harrisburg Member of the Kaibab Formation. In Arizona, these sites may be affiliated with the following gypsiferous soil series:

- Nikey-Ruesh complex,
- Gypill-Hobog complex,
- Hobog-Tidwell complex,
- Hobog-Grapevine complex,
- Grapevine-Shelly complex,
- Hindu-Rock outcrop-Gypill complex,
- Cave-Harrisburg-Grapevine complex, and
- Grapevine-Hobcan complex (Service unpublished data).

Sites in Utah are most affiliated with the following soil series (Service unpublished data, 2012, p. 1):

- Badland
- Fluvaquents and Torrifluvents, and
- Riverwash.

The Gierisch mallow occurs at elevations from 821 to 1,148 meters (m) (2,694 to 3,766 feet (ft)) in Arizona, and from 755 to 861 m (2,477 to 2,825 ft) in Utah. We could not correlate the Gierisch mallow's occurrences to a specific range of slopes; therefore, topography is not considered to be an essential physical feature for this species (Service unpublished data, 2012).

The Gierisch mallow occurs in sparsely vegetated, warm desert communities. All occupied habitat throughout its range occurs within the landcover described as Mojave mid-elevation mixed desert scrub (NatureServe 2011, p. 2). This classification represents the extensive desert scrub in the transition zone above the *Larrea tridentata* (creosote)–*Ambrosia dumosa* (white bursage) desert scrub and below the lower montane woodlands from 700 to 1800 m (2,296 to 5,905 ft) that occur in the eastern and central Mojave Desert. The vegetation within this ecological system is quite variable. A list of common plants associated with the Gierisch mallow habitat is included in Table 2.

TABLE 2: Vegetation Associated with Gierisch Mallow Habitat (NatureServe 2011, p. 2)

Codominant and diagnostic species	Woody plant species associates	Other common nonwoody species associates
<i>Coleogyne ramosissima</i> (blackbrush)	<i>Acacia greggii</i> (catclaw acacia)	<i>Achnatherum hymenoides</i> (Indian ricegrass)
<i>Eriogonum fasciculatum</i> (buckwheat)	<i>Ephedra nevadensis</i> (Nevada jointfir)	<i>Achnatherum speciosum</i> (desert needlegrass)
<i>Ephedra nevadensis</i> (Nevada jointfir)	<i>Ephedra torreyana</i> (desert Mormon tea)	<i>Muhlenbergia porteri</i> (bush muhly)

<i>Grayia spinosa</i> (spiny hopsage)	<i>Encelia farinosa</i> (brittlebush)	<i>Eriogonum</i> spp. (various annual buckwheats)
	<i>Purshia stansburiana</i> (Stansbury cliffrose)	<i>Pleuraphis jamesii</i> (James' galleta)
	<i>Gutierrezia sarothrae</i> (broom snakeweed)	<i>Poa secunda</i> (Sandberg bluegrass)

Depending on the moisture regime, the Gierisch mallow also can be associated with native annuals that are often ephemeral (seen only in the spring) and, like many Mohave Desert plant species, seasonally abundant based on climatic conditions. Gierisch mallow also appears to be associated with biologic soil crusts (Frates 2012, pers. comm.). Biological soil crusts provide fixed carbon on sparsely vegetated soils. Carbon contributed by these organisms helps keep plant interspaces fertile and aids in supporting other microbial populations (Beymer and Klopatek 1991 in Floyd *et al.* 2003, p. 1704). In desert shrub and grassland communities that support few nitrogen-fixing plants, biotic crusts can be the dominant source of nitrogen (Rychert *et al.* 1978 and others in Floyd *et al.* 2003, p. 1704). Additionally, soil crusts stabilize soils, help to retain moisture, and provide seed-germination sites. Soil crusts are effective in capturing wind-borne dust deposits, and have been documented contributing to a 2- to 13-fold increase in nutrients in southeastern Utah (Reynolds *et al.* 2001 in Floyd *et al.* 2003, p. 1704). The presence

of soil crusts generally increases the amount and depth of rainfall infiltration (Loope and Gifford 1972 and others in Floyd *et al.* 2003, p. 1704).

Therefore, based on the information above, we identify gypsum soils with biological soil crusts found in the Harrisburg Member of the Kaibab Formation from 755 to 1,148 m (2,477 to 3,766 ft) and with the appropriate native vegetation communities to be an essential physical or biological feature for this species.

Sites for Reproduction, Germination, Seed Dispersal or Pollination

The Gierisch mallow is a native species of sparsely vegetated, warm desert communities. Although we do not know how the species is pollinated, other species of the genus *Sphaeralcea* (globemallows) are pollinated by *Diadasia diminuta* (globemallow bee), which specializes in pollinating plants of this genus. Globemallow bees are considered important pollinators for globemallows (Tepedino 2010, p. 2). These solitary bees, as well as other *Diadasia* species, are known to occur within the range of the Gierisch mallow (Sipes and Tepedino 2005, pp. 490–491; Sipes and Wolf 2001, pp. 146–147), so it is reasonable to assume that they are potential pollinators of the Gierisch mallow and other associated vegetation in the surrounding community. The globemallow bee, along with other solitary bees, nest in the ground, and nests are commonly found in partially compacted soil along the margins of dirt roads in the western United States (Tepedino 2010, p. 1). Prior to the proliferation of roads, it is possible that the bees nested in soils compacted by herd animals or trails (Esque 2012, pers. comm.). It is

important to protect those nesting sites and associated natural habitat for the globemallow bee and other potential pollinators.

Natural habitat for the globemallow bee and other potential pollinators includes those appropriate vegetation communities described above in Table 2. The lack of favorable natural habitat can negatively influence pollination productivity (Kremen *et al.* 2004, pp. 1116–1117). Sites for the Gierisch mallow's reproduction, germination, and seed dispersal, and pollination providers are found within the communities described above. Because the Gierisch mallow is potentially pollinated by globemallow bees and other insects, the presence of pollinator populations is essential to the conservation of the species. Preservation of the mix of species and interspecific interactions they encompass greatly improves the chances for survival of rare species in their original location and habitat (Tepedino *et al.* 1996, p. 245). Redundancy of pollinator species is important because a pollinator species may be abundant one year and less so the next year. Maintaining a full suite of pollinators allows for the likelihood that another pollinator species will stand in for a less abundant one, and is essential in assuring adequate pollination.

Bees have a limited foraging range strongly correlated to body size (Greenleaf, 2005, p. 17; Steffan-Dewenter and Tschardtke 1999, pp. 434–435). Fragmentation of habitat can result in isolating plants from pollinator nesting sites. When the distance between plants and the natural habitats of pollinators increases, plant reproduction (as measured by mean seed set) can decline by as much as 50 percent in some plant species

(Steffan-Dewenter and Tscharntke 1999, pp. 435–436). Optimal pollination occurs when there is abundance of individual pollinators and a species-rich bee community (Greenleaf 2005, p. 47).

Greenleaf (2005, p. 15) defines the typical homing distance of a bee taxon as the distance at which 50 percent of individual bees of that taxon have the ability to return to their home (nest, etc.). Solitary bees of various species have been documented to have foraging distances ranging from 150 m (492 ft) to 1,200 m (3,937 ft) (Gathmann and Tscharntke 2002, p. 760; Greenleaf *et al.* 2007, p. 593).

Therefore, based on the information above, we identify pollinators and associated appropriate native plant communities within 1,200 m (3,937 ft) of occupied sites to be an essential physical or biological feature for this species.

Habitats Protected from Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

The species' known range has not contracted or expanded since the species was described in 2002. All sites contribute to ecological distribution and function for this species by providing representation across the species' limited current range. It is important to minimize surface-disturbing activities throughout the limited range of the Gierisch mallow. Surface-disturbing activities, such mining and recreation activities (off-

highway vehicle (OHV) use and impacts related to target shooting), remove the unique soil composition and associated vegetation communities that the Gierisch mallow needs.

Additionally, it is important to have areas in all the critical habitat units free of nonnative, invasive species, such as red brome (*bromus rubens*) and cheatgrass (*bromus tectorum*). Both cheatgrass and red brome tend to not grow well in gypsum outcrops in normal (dry) rainfall years (Roaque 2102b, p. 1); however, they can be abundant in Gierisch mallow habitat during wet years, providing continuous fuels in otherwise open spaces (Roth 2012, entire). Invasions of annual, nonnative species, such as cheatgrass, are well documented to contribute to increased fire frequencies (Brooks and Pyke 2002, p. 5; Grace *et al.* 2002, p. 43; Brooks *et al.* 2003, pp. 4, 13, 15). The disturbance caused by increased fire frequencies creates favorable conditions for increased invasion by cheatgrass. The end result is an increase in invasive species that results in more fires, more fires create more disturbances, and more disturbances lead to increased densities of invasive species. The risk of fire is expected to increase from 46 to 100 percent when the cover of cheatgrass increases from 12 to 45 percent or more (Link *et al.* 2006, p. 116). The invasion of red brome into the Mojave Desert of western North America poses similar threats to fire regimes, native plants, and other federally protected species (Brooks *et al.* 2004, pp. 677–678). Brooks (1999, p. 16) also found that high interspace biomass of red brome and cheatgrass resulted in greater fire danger in the Mojave Desert. Brooks (1999, p. 18) goes on to state that the ecological effects of cheatgrass- and red brome-driven fires are significant because of their intensity and consumption of perennial shrubs.

Imprecise forecasts of the impacts of climate change make the identification of areas that may become essential impractical at this time. Therefore, we have not identified additional areas outside those currently occupied where the species may move to, or be transplanted to, as a result of the impacts due to climate change.

Based on the information above, we identify areas free of disturbance and areas with low densities or absence of nonnative, invasive species to be an essential physical or biological feature for this species.

Primary Constituent Elements for the Gierisch Mallow

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the Gierisch mallow in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Gierisch mallow are:

(1) Appropriate geological layers or gypsiferous soils, in the Harrisburg Member of the Kaibab Formation, that support individual Gierisch mallow plants or their habitat, within the elevation range of 775 to 1,148 m (2,477 to 3,766 ft). Appropriate soils are defined as:

- Badland,
- Fluvaquents and Torrifluvents,
- Riverwash,
- Cave-Harrisburg-Grapevine complex,
- Grapevine-Hobcan complex,
- Nikey-Ruesh complex,
- Gypill-Hobog complex,
- Hobog-Tidwell complex,
- Hobog-Grapevine complex,
- Grapevine-Shelly complex, and
- Hindu-Rock outcrop-Gypill complex.

(2) Appropriate Mojave desert scrub plant community and associated native species for the soil types at the sites listed in PCE 1.

(3) Biological soil crusts within the soil types described in PCE 1.

(4) The presence of insect visitors or pollinators, such as the globemallow bee and other solitary bees. To ensure the proper suite of pollinators are present, this includes

habitat that provides nesting substrate for pollinators in the areas described in PCE 2.

(5) Areas free of disturbance and areas with low densities or absence of nonnative, invasive plants, such as red brome and cheatgrass.

With this designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species, through the identification of primary constituent elements sufficient to support the life-history processes of the species. All units designated as critical habitat are currently occupied by the Gierisch mallow and contain the primary constituent elements sufficient to support the life-history needs of the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the direct and indirect effects associated with the following threats: Habitat loss and degradation from mining operations; livestock grazing; recreation activities; and invasive plant species. Please refer to the final listing rule published elsewhere in today's **Federal Register** for a complete description of these threats.

Special management to protect the features essential to the conservation of the species from the effects of gypsum mining include creating managed plant preserves and open spaces, limiting disturbances to and within suitable habitats, and evaluating the need for (and conducting restoration or revegetation of) native plants in open spaces or plant preserves containing similar gypsum soils. Management activities that could ameliorate these threats include (but are not limited to) seed collection from the Gierisch mallow throughout its range, including those plants within the footprint of each mine. These seeds could be used to begin propagation studies to determine the long-term viability of plants growing in reclaimed soils. Additionally, these seeds could be used to begin propagating plants to be planted in other gypsum deposits and to augment existing populations. In addition to collecting seeds directly from plants, the seed bank could be collected from the top 1 inch of soil before the surface disturbance occurs as long as soils are properly handled during seed bank collection (Scoles-Sciulla and DeFalco 2009, entire). Special management may be necessary to protect features essential to the conservation of the Gierisch mallow from livestock grazing, including fencing populations; avoiding activities, such as water trough placement, that might concentrate livestock near or in occupied habitat; and removing livestock from critical habitat during the species' growing and reproductive seasons, especially during periods of flowering and fruiting. Special management that may be necessary to protect the features essential to the conservation of the Gierisch mallow from recreational activities includes directing recreational use away from and outside of critical habitat, fencing small populations, removing or limiting access routes, ensuring land use practices do not disturb the

hydrologic regime, and avoiding activities that might concentrate water flows or sediments into critical habitat. Additionally, threats related to both control of nonnative, invasive species and fire suppression and fire-related activities resulting from the spread of nonnative, invasive species include:

- Crushing and trampling of plants from fire suppression and treatment activities;
- Damage to seedbank as a result of fire severity;
- Soil erosion; and
- An increase of invasive plant species that may compete with native plant species as a result of wildfires removing non-fire-adapted native plant species or as a result of fire suppression equipment introducing invasive plant species.

Criteria Used To Identify Critical Habitat

Geographic Range Occupied at the Time of Listing

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographic area occupied by the species as described in the final rule to list the

Gierisch mallow (see *Species Information* section of the final rule to list the species published elsewhere in today's **Federal Register**) and that contain one or more of the identified primary constituent elements. The geographic area occupied by Gierisch mallow is considered its current range, which includes some areas or patches that are devoid of plants. We are not designating any areas outside the geographic area occupied by the species, because we have determined that unoccupied areas are not essential for the conservation of the species.

Our rationale for not including areas outside of the geographic range of Gierisch mallow is twofold. First, the areas designated as occupied contain the physical or biological features essential for the conservation of the species. Second, within the overall geographic area occupied by the species, there are some areas or patches devoid of plants, as one would expect. Therefore, it follows that within the critical habitat units we are designating, there are areas without the plant growing in them. Thus, even though all units are occupied when considering the appropriate scale for critical habitat designation, there is still room for more plants to grow. This should provide room for expansion of the existing populations. Should recovery planning for this species include actions to augment or establish additional populations, the critical habitat units will provide for enough habitat to allow for those activities. Therefore, we conclude that unoccupied areas outside of the geographic range of the Gierisch mallow are not essential for the conservation of the species.

There is no information on the historical range of this species; however, it is possible that the gypsum hills supported populations of the Gierisch mallow before active mining (and removal of the gypsum) began, but there is no information that the species occurred outside of its current range. Currently, there are 18 known populations restricted to less than approximately 186 ha (460 ac) in Arizona and Utah, combined. The main populations in Arizona are located south of the Black Knolls, approximately 19.3 km (12 mi) southwest of St. George, Utah, with the southernmost population of this group being on the edge of Black Rock Gulch near Mokaac Mountain. There is another population approximately 4.8 km (3 mi) north of the Black Knolls, on ASLD lands near the Arizona/Utah State line. The Utah population is located on BLM lands within 3.2 km (2 mi) of the Arizona/Utah State line, near the Arizona population on ASLD land. Gypsum outcrops associated with the Harrisburg Member are scattered throughout BLM lands in northern Arizona and southern Utah. Extensive surveys were conducted in these areas because numerous other rare plant species are associated with these landforms. Gierisch mallow plants were not located in any other areas beyond what is currently known and described above (Atwood 2008, p. 1). In identifying critical habitat units for Gierisch mallow, we proceeded through a multi-step process.

Mapping

We obtained records of Gierisch mallow distribution from BLM's Arizona Strip Field Office, BLM's St. George Field Office, and both published and unpublished

documentation from our files. This information included BLM hand-mapped polygons that outlined Gierisch mallow habitats in Arizona and Utah.

For all areas, survey data from 2001 to 2011 were available and evaluated to identify the extent of occupied habitat (provided by BLM). Although occupied sites may gradually change, recent survey results confirm that plant distribution is similar to observed distributions over the last 10 years.

Our approach to delineating critical habitat units was applied in the following manner:

(1) We overlaid Gierisch mallow locations into a GIS database. This provided us with the ability to examine slope, aspect, elevation, vegetation community, and topographic features, such as drainages, in relation to the locations of Gierisch mallow on the landscape. The locations of Gierisch mallow, and their relationship to landscape features, verified our previous knowledge of the species and slightly expanded the previously recorded elevation ranges for Gierisch mallow. We examined Gierisch mallow locations in an attempt to identify any correlation with aspect, slope, and occurrence location for this species; however, we found no such correlation.

To better understand the relationship of the Gierisch mallow locations to specific soils, we also examined soil series layers, aerial photography, and hardcopy geologic maps. For Gierisch mallow, we analyzed soil survey layers. For Gierisch mallow locations in Utah, we found that 26.02 percent of all individuals rangewide (Arizona and

Utah) are associated with Badland, and 0.03 percent of all individuals are associated with Fluvaquents and Torrifluvents soil complexes. In Arizona, we found that occupied sites are associated with the following soil types (percentages are rangewide):

- Nikey-Ruesh complex (3.14 percent),
- Gypill-Hobog complex (65.94 percent),
- Hobog-Tidwell complex (3.53 percent),
- Hobog-Grapevine complex (0.85 percent),
- Grapevine-Shelly complex (0.24 percent), and
- Hindu-Rock outcrop-Gypill complex (0.25 percent) (Service unpublished data).

This provided us with several polygons of occupied habitat spread across the above soil series.

(2) To further refine our critical habitat, we then included 1,200 m (3,937 ft) of pollinator habitat around the polygons of occupied habitat to ensure that all potential pollinators would have a sufficient habitat to establish nesting sites and to provide pollinating services for Gierisch mallow, as described in *Primary Constituent Elements for the Gierisch Mallow* above. Additionally, the 1,200 m (3,937 ft) of pollinator habitat included three other gypsiferous soil types that also contain the necessary habitat for the Gierisch mallow. These soil types are the

- Riverwash,
- Cave-Harrisburg-Grapevine complex, and

- Grapevine-Hobcan complex.

(3) We then drew critical habitat boundaries that captured the locations, soils, and pollinator habitat elucidated under (1) and (2) above. Critical habitat designations were then mapped using Albers Equal Area (Albers) North American Datum 83 (NAD 83) coordinates.

In summary, critical habitat includes all gypsum soils described above as well as the appropriate Mojave desert scrub plant community and associated native species associated and biological soil crusts within the appropriate gypsum soils. Critical habitat also includes all pollinators and their habitat within 1,200 m (3,937 ft) of gypsum soils occupied by Gierisch mallow. When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features for Gierisch mallow. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the final rule and are not being designated as critical habitat. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any

accompanying regulatory text, presented at the end of this document in the rule portion.

We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on

<http://www.regulations.gov> at Docket No. FWS–R2–ES–2013–0018, on our Internet site (<http://www.fws.gov/southwest/es/arizona/>), and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

We are designating as critical habitat lands that we have determined to be areas occupied at the time of listing and that contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the species. No lands outside of the geographic area occupied at the time of listing are designated as critical habitat. The area included in both units is large enough and contains sufficient habitat to ensure the conservation of Gierisch mallow.

Two units are designated based on sufficient elements of physical or biological features being present to support Gierisch mallow life processes. Both units contain all physical and biological features and support multiple life processes.

Final Critical Habitat Designation

We are designating two units as critical habitat for Gierisch mallow. Both units are occupied and contain features that are essential to the conservation of Gierisch mallow. We mapped the units with a degree of precision commensurate with the

available information and the size of the unit. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. The two areas we are designating as critical habitat are the Starvation Point Unit and the Black Knolls Unit. The approximate area of each critical habitat unit is shown in Table 3.

TABLE 3. Designated Critical Habitat Units for Gierisch Mallow.

(Area estimates reflect all land within critical habitat unit boundaries).

Critical Habitat Unit	BLM AZ Federal	BLM UT Federal	AZ State Lands	UT State Lands	Totals
Unit 1. Starvation Point	220 ha (544 ac)	802 ha (1,982 ac)	249 ha (615 ac)	68 ha (167 ac)	1,339 ha (3,309 ac)
Unit 2. Black Knolls	3,586 ha (8,862 ac)	0	263 ha (651 ac)	0	3,850 ha (9,513 ac)
Totals	3,806 ha (9,406 ac)	802 ha (1,982 ac)	512 ac (1,266 ac)	68 ha (167 ac)	5,189 ha (12,822 ac)

Note: Area sizes may not sum due to rounding.

Below, we present brief descriptions of all units and reasons why they meet the

definition of critical habitat for Gierisch mallow.

Unit 1: Starvation Point

This unit consists of 1,339 ha (3,308.7492 ac) in Arizona and Utah, and occurs on land managed by Arizona BLM (220.31 ha; 544.40 ac) and Utah BLM (802.11 ha; 1,982.07 ac), SITLA in Utah (67.73 ha; 167.38 ac), and ASLD in Arizona (248.83 ha; 614.87 ac). This unit was occupied at the time of listing and contains the features essential to the conservation of the species. Unit 1 contains two Gierisch mallow populations, including the second largest population. Unit 1 is located west of I-15 as this highway crosses the State line of Arizona and Utah, and is bounded by the Virgin River to the west and I-15 to the south and east.

The features essential to the conservation of the species may require special management considerations or protection to control invasive plant species, to control habitat degradation due to the recreation and mining activities that disrupt the soil composition, and to maintain the identified associated vegetation and pollinators essential to the conservation of the species. The portion of habitat that occurs on ASLD occurs within the footprint of the Georgia-Pacific Mine, which could resume gypsum mining operations in the near future. Grazing, which can modify the primary constituent elements and may require special management, typically occurs outside of the growing season for Gierisch mallow in the one pasture on Utah BLM and SITLA lands within this unit; however, recent wildfires in adjacent pastures in this allotment have resulted in

livestock grazing occurring into the spring growing season for Gierisch mallow. These recently burned pastures have since been rehabilitated, and livestock grazing is anticipated to return to its normal grazing rotation of November 1 to February 28 in the future (Douglas 2012, p. 1).

Unit 2: Black Knolls

This unit consists of approximately 3,850 ha (9,513 ac) in Arizona, and occurs on land managed by both Arizona BLM (3,586.28 ha; 8,861.90 ac) and ASLD (263.62 ha; 651.41 acres). This unit is occupied at the time of listing and contains the features essential to the conservation of the species. Unit 2 contains the remaining 16 Gierisch mallow populations, including the largest population. Unit 2 is located south of I-15 as this highway crosses the State line of Arizona and Utah, and is bounded by Black Rock Gulch to the west and Mokaac Mountain to the south and east.

The features essential to the conservation of the species may require special management considerations or protection to control invasive plant species, to control habitat degradation due to mining activities that disrupt the soil composition, and to maintain the identified associated vegetation and pollinators essential to the conservation of the species. The largest population of Gierisch mallow occurs in the area of the proposed expansion of the Black Rock Gypsum Mine. As described in the final listing rule published elsewhere in today's **Federal Register**, grazing on BLM lands in Arizona typically occurs during the growing season for Gierisch mallow on all three BLM

allotments within this critical habitat designation and is expected to modify the primary constituent elements, although some of the pastures are in a rest/rotation system in which a pasture may see an entire year of rest before being grazed again.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of “destruction or adverse modification” (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of

the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

- (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
- (2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to

jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

- (1) Can be implemented in a manner consistent with the intended purpose of the action,
- (2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,
- (3) Are economically and technologically feasible, and
- (4) Would, in the Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency’s discretionary involvement or control is authorized by law). Consequently, Federal

agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the “Adverse Modification” Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for Gierisch mallow. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Gierisch mallow. These activities include, but are not limited to, actions that would significantly alter soil

composition that Gierisch mallow requires, including, but not limited to, mining operations, livestock grazing, and special use permits for recreation activities.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: “The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” There are no Department of Defense lands with a completed INRMP within the critical habitat designation.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an

area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (IEc 2013, all). The draft analysis, dated February 22, 2013, was made available for public review from March 28, 2013, through April 29, 2013 (78 FR 18943).

Following the close of the comment period, a final analysis of the potential economic effects of the designation was developed, taking into consideration the public comments and any new information.

The intent of the final economic analysis (FEA) is to quantify the economic impacts of all potential conservation efforts for Gierisch mallow; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

While we think that the incremental effects approach is appropriate and meets the

intent of the Act, we have taken a conservative approach in this instance to ensure that we are fully evaluating the probable effects of this designation. Given that we do not have a new definition of “destruction or adverse modification,” there may be certain circumstances where we may want to evaluate impacts beyond those that are solely incremental. Such is the case with Gierisch mallow, where we have extensive case law and determinations of effects that suggest we gather information concerning not only incremental effects, but also coextensive effects.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 2012 (year of the species’ proposed listing) (77 FR 49894), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts of Gierisch mallow conservation efforts associated with the following categories of activity: (1)

Gypsum mining; (2) livestock grazing; (3) BLM Land Use Plan amendment; and (4) transportation projects.

Economic impacts associated with the designation of critical habitat are primarily administrative costs associated with consultations under section 7 of the Act. These economic impacts are expected to include both formal and informal consultations under section 7 of the Act as well as technical assistance for those projects that do not have a Federal nexus but are anticipated to impact Gierisch mallow critical habitat. Incremental impacts associated with consultations for the effects of the above described activities are expected to amount to \$51,000 above the baseline cost over the next 20 years. Of that \$51,000, approximately \$4,700 will be associated with gypsum mining, \$27,000 will be attributed to livestock grazing; \$12,000 will be associated with BLM land management activities, and \$7,000 will be associated with transportation projects along Interstate 15.

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Our economic analysis also did not indicate that the benefits of exclusion of critical habitat outweigh the benefits of inclusion. Consequently, the Secretary is not exerting her discretion to exclude any areas from this designation of critical habitat for the Gierisch mallow based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Arizona Ecological Services Office (see **ADDRESSES**) or by downloading from the Internet at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0018 or at

<http://www.fws.gov/southwest/es/arizona/>.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider the impact on national security of specifying any particular area as critical habitat. In preparing this rule, we have determined that the lands within the designation of critical habitat for the Gierisch mallow are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to exert her discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs or other management plans for Gierisch mallow, and this final designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this critical habitat designation. Accordingly, the Secretary is not exercising her discretion to exclude any areas from this final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866, while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and

an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for Gierisch mallow will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer

than 50,000 residents; as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

In our final economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Gierisch mallow and the designation of critical habitat. The

analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 4 through 5 and Appendix A of the analysis and evaluates the potential for economic impacts related to: (1) Gypsum mining; (2) livestock grazing; (3) BLM Land Use Plan amendment; and (4) transportation projects. One of the mining companies (Western Mining) is larger than the threshold for small businesses and is operating on BLM-managed lands. Because Western Mining is operating on BLM-managed lands, there is a Federal nexus, which requires BLM to consult with us for impacts to critical habitat associated with these mining operations. The other mining company (Georgia-Pacific) is also larger than the threshold for small businesses, but it is operating on ASLD-managed lands and, therefore, does not have a Federal nexus. Because there is no Federal nexus associated with ASLD-managed lands, Georgia-Pacific is not required to consult with our office for impacts to critical habitat associated with their mining operations. Livestock grazing operations occurring on BLM-managed lands will also require consultation with our office by the BLM due to the Federal nexus of BLM permitting these activities on their lands. Administrative costs of consultations on road and bridge construction and maintenance are expected to be borne by us, the Federal Highway Administration, and the Arizona Department of Transportation. Therefore, no incremental impacts to small entities will be associated with these consultations. Many of BLM's remaining land management activities, as well as those described above, associated with their Land Use Plan will require consultation with our office and will not involve third parties. Because these consultations do not involve third parties, no impacts to small entities are expected related to these consultations and conservation efforts.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders (EOs) 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EOs' regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies, which are not by definition small business entities. As

such, we certify that this designation of critical habitat will not have a significant economic impact on a substantial number of small business entities. Therefore, a final regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our final economic analysis for this rule we considered and evaluated the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the Gierisch mallow. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the “Adverse Modification” Standard* section).

In summary, we considered whether this designation will result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we conclude that this rule will not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for Gierisch mallow will not have a significant economic impact on a substantial number of small entities, and a final regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared to not taking the regulatory action under consideration. The economic analysis determined that Gierisch mallow critical habitat will have no effect on any aspect of energy supply or distribution. Therefore, the economic analysis finds that none of these criteria is relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with Gierisch mallow conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

- (1) This rule will not produce a Federal mandate. In general, a Federal mandate

is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)-(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect

is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because the lands being designated as critical habitat are owned by the State of Arizona, State of Utah, and the BLM. None of these government entities fit the definition of “small governmental jurisdiction.” Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Gierisch mallow in a takings implications assessment. As discussed above, the designation of critical habitat affects

only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. We believe that the takings implications associated with this critical habitat designation will be insignificant, in part, because both units designated are currently considered occupied by the Gierisch mallow and the ability of the species to persist is very closely tied to its habitat. As a result of the biology and life-history characteristics of this species, we found only minor incremental differences between the outcomes of section 7 consultation with and without designation of critical habitat.

Our economic analysis found that the impacts of any potential project modifications, and, therefore, impacts to private land rights, resulting from the designation of critical habitat will be very small. This is because the baseline situation without designating critical habitat already provides protections to the species and its habitats through being listed as endangered. With or without critical habitat, Federal actions that may affect the Gierisch mallow will be required to undergo section 7 consultation. Because the species is so closely associated with its habitat, we cannot foresee a different outcome of the section 7 consultation under either the jeopardy or adverse modification standards. For private actions not involving a Federal nexus, no change in potential impacts to private land rights will result from the designation of critical habitat because critical habitat protections only apply to Federal actions.

Overall, our economic analysis and environmental assessment found only very minor incremental costs associated with the critical habitat designation, and we do not, therefore, anticipate that the critical habitat designation for the Gierisch mallow will result in significant incremental economic impacts above and beyond the current regulatory burden. Additionally, our economic analysis considered whether designating critical habitat will result in a significant economic effect on a substantial number of small entities. The economic analysis found that designation will not affect a substantial number of small entities. Based on information contained in the final economic analysis and final environmental assessment and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, we anticipate that this critical habitat designation will result in insignificant takings implications on these lands. The takings implications assessment concludes that this designation of critical habitat for Gierisch mallow does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Arizona and Utah. We did not receive any comments from State resource agencies in Arizona and Utah. The

designation of critical habitat in areas currently occupied by the Gierisch mallow imposes no additional restrictions to those put in place by the listing of this species and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and

that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the Gierisch mallow. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of Gierisch mallow, under the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation and notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

We performed the NEPA analysis, and the draft environmental assessment was made available for public comment on March 28, 2013 (78 FR 18943). The final environmental assessment has been completed and is available for review with the publication of this final rule. You may obtain a copy of the final environmental assessment online at <http://www.regulations.gov> under Docket No. FWS–R2–ES–2013–0018, by mail from the Arizona Ecological Services Office (see **ADDRESSES**), or by visiting our Web site at <http://www.fws.gov/southwest/es/arizona/>.

The environmental analysis evaluated three alternatives: No critical habitat

designation, critical habitat designation with no exclusions, and critical habitat designation with the exclusion of the gypsum mines. The assessment considered potential impacts to the human environment from implementation of each alternative. The assessment differentiates between section 7 consultations that will occur due to the listing of the species regardless of critical habitat designation, and consultations that result from the presence of critical habitat. As a result of the environmental assessment, it was determined that there would be no benefit to excluding the lands proposed for gypsum mining from critical habitat. Pursuant to the Council on Environmental Quality regulations for implementing NEPA (40 CFR 1500-1518), the environmental analysis determined that, in the context of short- and long-term impacts, the effects of the critical habitat designation at this scale would be small. Additionally, the environmental analysis determined that the intensity of impacts of designation of critical habitat for Gierisch mallow would be low. Furthermore, the environmental assessment concluded that the designation of critical habitat for the Gierisch mallow does not constitute a major Federal action significantly affecting the quality of the human environment under the meaning of section 102(2)(C) of NEPA.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our

responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands that are occupied by the Gierisch mallow that contain the physical or biological features essential for conservation of the species, and no tribal lands unoccupied by the Gierisch mallow that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the Gierisch mallow on tribal lands.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> at Docket No. FWS-R2-ES-2013-0018 and upon request from the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff of the Arizona Ecological Services Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we are amending part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

2. Amend § 17.96(a) by adding an entry for “*Sphaeralcea gierischii* (Gierisch mallow),” in alphabetical order under the family Malvaceae, to read as follows:

§ 17.96 Critical habitat—plants.

- (a) *Flowering plants.*

* * * * *

Family Malvaceae: *Sphaeralcea gierischii* (Gierisch mallow)

(1) Critical habitat units are depicted for Washington County, Utah, and Mohave County, Arizona, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Gierisch mallow consist of the following components:

(i) Appropriate geological layers or gypsiferous soils, in the Harrisburg Member of the Kaibab Formation, that support individual Gierisch mallow plants or their habitat, within the elevation range of 775 to 1,148 meters (2,477 to 3,766 feet). Appropriate soils are defined as:

- (A) Badland,
- (B) Fluvaquents and Torrifluents,
- (C) Riverwash,
- (D) Cave-Harrisburg-Grapevine complex,
- (E) Grapevine-Hobcan complex,
- (F) Nikey-Ruesh complex,
- (G) Gypill-Hobog complex,
- (H) Hobog-Tidwell complex,

- (I) Hobog-Grapevine complex,
- (J) Grapevine-Shelly complex, and
- (K) Hindu-Rock outcrop-Gypill complex.

(ii) Appropriate Mojave desert scrub plant community and associated native species for the soil types at the sites listed in paragraph (2)(i) of this entry.

(iii) Biological soil crusts within the soil types listed in paragraph (2)(i) of this entry.

(iv) The presence of insect visitors or pollinators, such as the globemallow bee and other solitary bees. To ensure the proper suite of pollinators are present, this includes habitat that provides nesting substrate for pollinators in the areas described in paragraph (2)(ii) of this entry.

(v) Areas free of disturbance and areas with low densities or absence of nonnative, invasive plants, such as red brome and cheatgrass.

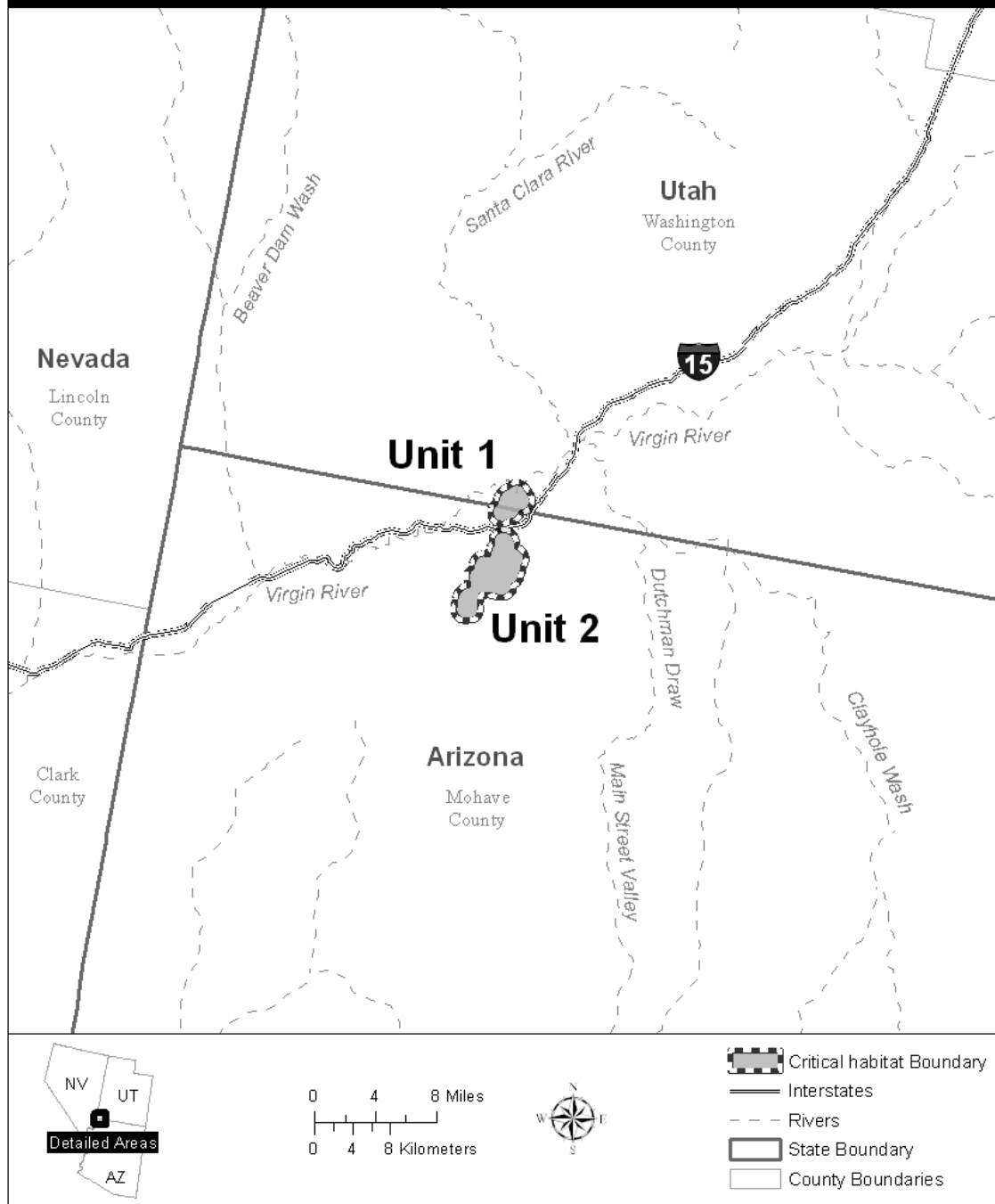
(3) Critical habitat includes all gypsum soils described in paragraph (2) of this entry, as well as the appropriate Mojave desert scrub plant community and associated native species and biological soil crusts within the appropriate gypsum soils. Critical habitat also includes all pollinators and their habitat within 1,200 meters (3,937 feet) of

gypsum soils occupied by Gierisch mallow. Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(4) *Critical habitat map units.* Data layers defining map units were created using Albers Equal Area (Albers) North American Datum 83 (NAD 83) coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site (<http://www.fws.gov/southwest/es/Arizona/>), at the Federal eRulemaking Portal (<http://www.regulations.gov>, at Docket No. FWS-R2-ES-2013-0018, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

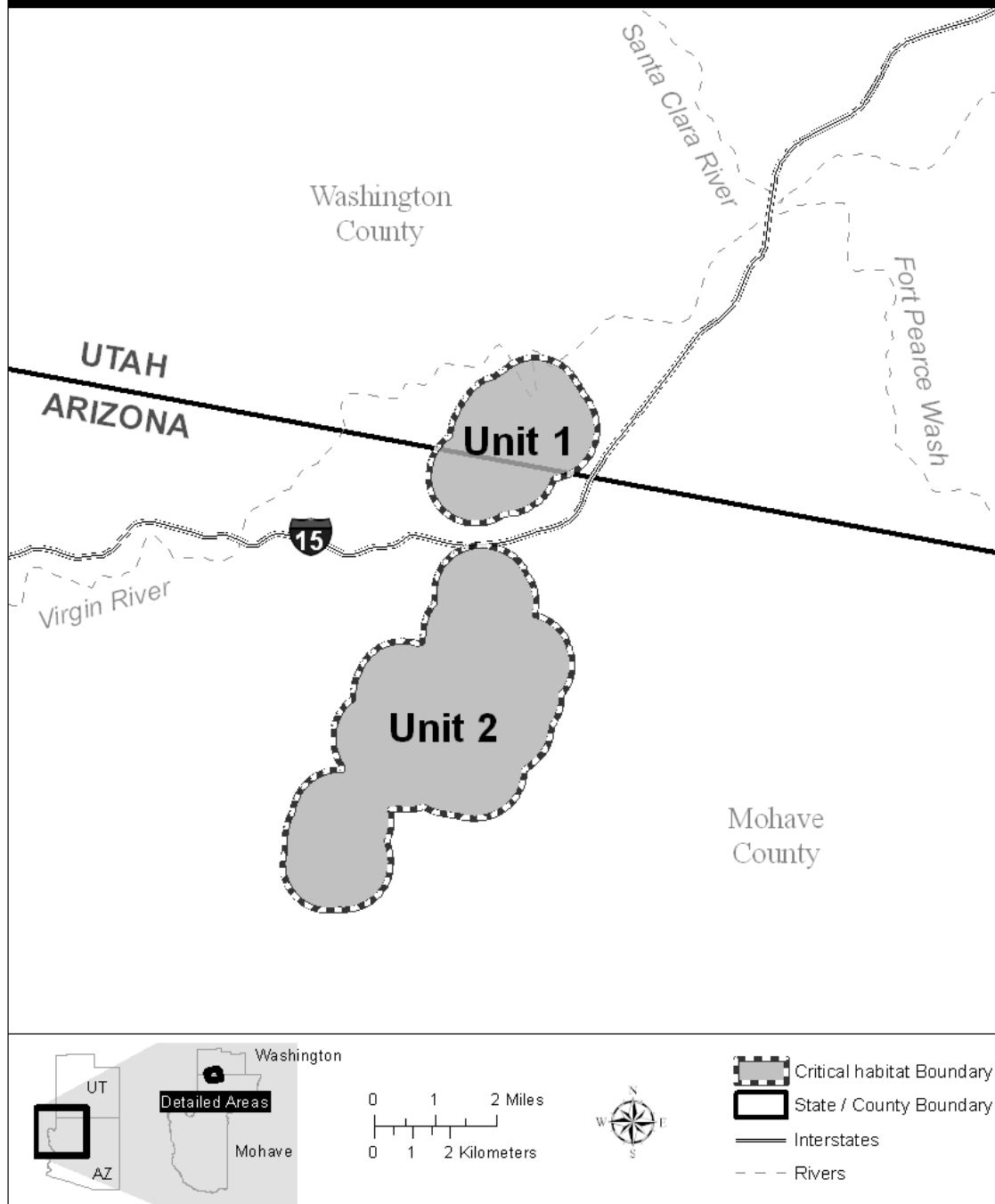
(5) Index map follows:

Overview of Critical Habitat for the Gierisch Mallow



(6) Unit 1: Starvation Point Unit, Mohave County, Arizona, and Washington County, Utah. Map of Units 1 and 2 follows:

Gierisch Mallow Critical Habitat



(7) Unit 2: Black Knolls Unit, Mohave County, Arizona. Map of Unit 2 is provided at paragraph (6) of this entry.

* * * * *

August 1, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55-P

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